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Utah Court of Appeals

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James H Beadles; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorney for Appellees.
Craig S. Cook; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

EDWARD DALE HARDY, II, PETITIONER/APPELLANT, v. UTAH BD. OF PARDONS & PAROLE; SCOTT CARVER, WARDEN, UTAH STATE PRISON; LINDA CLARKE, WARDEN, CALIFORNIA TRAINING FACILITY, RESPONDENTS/APPELLEES.	**PRIORITY NO. 3** **CASE NO. 990774-CA**

BRIEF OF APPELLEE

HARDY APPEALS FROM THE TRIAL COURT'S DENIAL OF HIS REQUEST FOR EXTRAORDINARY RELIEF AND DISMISSAL OF HIS PETITION AGAINST THE PAROLE RELEASE DECISION OF THE UTAH BOARD OF PARDONS AND PAROLE, BEFORE THE HONORABLE TIMOTHY R. HANSON, THIRD JUDICIAL DISTRICT COURT

CRAIG S. COOK
3645 E. Cascade Way
Salt Lake City, Utah 84109

ATTORNEY FOR PETITIONER

JAMES H. BEADLES (5250)
Assistant Attorney General
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
(801) 366-0353 (Telephone)
(801) 366-0352 (Facsimile)

ATTORNEYS FOR RESPONDENTS

FILED
Utah Court of Appeals
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IN THE UTAH COURT OF APPEALS

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Assistant Attorney General
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
(801) 366-0353 (Telephone)
(801) 366-0352 (Facsimile)

ATTORNEYS FOR RESPONDENTS

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IN THE UTAH COURT OF APPEALS

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NATURE OF THE CASE AND STATEMENT OF JURISDICTION

Hardy appeals from the trial court's dismissal of his petition for an extraordinary writ pursuant to rule 65B(d), Utah Rules of Civil Procedure. He claims that the Board relied on incorrect information in its 1986 parole hearing. Therefore, he asserts constitutional entitlement to a new parole hearing at which he would be able to personally appear. This Court has appellate jurisdiction by virtue of the Utah Supreme Court's pour-over authority. Utah Code Ann. § 78-2-2(4) (Supp. 1999)

ISSUES AND STANDARD OF APPELLATE REVIEW

1. Since the facts set forth in the exhibits to Hardy's petition, accepted as true, themselves showed that he could not establish a claim for relief, did the trial court correctly decide that it could dismiss the petition under rule 12(b)(6), Utah Rules of Civil Procedure? When reviewing dismissal of a petition for an extraordinary writ, this Court

accords no deference to the trial court's legal conclusions. *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664 (Utah 1997).

2. When Hardy had already admitted to the Board that he had escaped from the Utah State Prison and committed a felony in California while on escape status, did the later expungement of two prison disciplinaries arising from that escape require the Board, as a matter of due process, to give Hardy a new, in-person, parole hearing? When reviewing dismissal of a petition for an extraordinary writ, this Court accords no deference to the trial court's legal conclusions. *Padilla,* 947 P.2d 664. Further, this Court only reviews the fairness of the process before the board, not its substantive parole release decision. *Id.*

3. Since the procedural due process protections set forth in *Labrum v. Utah Bd. of Pardons*, 870 P.2d 902, 913 (Utah 1993) were made effective on a prospective basis only, is Hardy, who was originally heard by the parole board in 1986, entitled to them. This legal question is subject to de novo review for correctness. *Padilla,* 947 P.2d 664.

RELEVANT PROVISIONS

Statutory and constitutional provisions relevant to this case are cited in the text.

STATEMENT OF FACTS

Hardy became subject to the Board's jurisdiction in September 1979 when he was sentenced to a life term at the Utah State Prison for first-degree murder (R. 294). Less than two years after beginning his Utah sentence, however, Hardy escaped from the Utah

prison and went to California where he promptly committed aggravated assault (*id.*). After conviction for that crime, he resided in a California prison until February 1986 (*id.* at 288). He then returned to the Utah and began to serve the balance of his Utah sentence (*id.*).

After a few continuances, the Board held an original parole grant hearing on September 24, 1986 (*id.*).[1] Exhibits to Hardy's petition showed that notice of that hearing was mailed on September 17, 1986 (*id.*). In a partial transcript of the September 24 hearing, which is attached to Hardy's petition, he admits to the Board that he "left" the prison: "I won't admit to an escape but I'll admit that I left. I didn't leave in that [sic] manner of what they said" (R. 49). Hardy also admitted to having committed three disciplinary violations while in the California prison system, including assault on another inmate (*id.*).

Board member Frances Palacios then questioned Hardy in more detail regarding the escape.

> PALACIOS: I just have one question Mr. Hardy. Um, you, it goes to the escape. You have no new conviction, you have no disciplinary convictions that I can see or acknowledge, but at the same time we have what I think you are acknowledging and that is a prima facie case of escape. You were in custody,

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[1] The Board initially was to convene its hearing on September 9, 1986. Notice of that hearing was given by a letter dated August 4, 1986 (R. 25). On August 12, 1986, the Board sent Hardy a letter advising him that the date for the hearing was changed to September 10, 1986 (R. 27). On September 10, however, the Board informed Hardy that his hearing would again be postponed until the full Board could attend (R. 45, 46). The Board sent Hardy a letter on September 17, 1986 telling him that the hearing would be held on September 24. Hardy denies receiving the letter (R. 39).

> you had no legal order to be out of custody, and you ended up out of custody.
>
> HARDY: Yes.
>
> PALACIOS: Now, we have a report, a rather detailed report that tells us about all of the things that you did. That's the only information we have. If you would have us believe that Scotty beamed you outside those prison walls, that's fine. But if you would prepare, to present to us an explanation of how you got outside the walls, I'd be happy to hear it. Otherwise, all I have is the report that I've got.
>
> HARDY: No, I'd rather not comment.

(R. 56). Later on in the hearing, Board Member Dennis Fuchs expressed his concern, not just with the escape, but with Hardy's then committing a crime substantially similar to the one for which he was originally sentenced in Utah (*id.*). At the conclusion of the hearing, the Board chairman announced a parole release date of September 14, 2004 (*id.* at 58).

On August 24, 1990, to settle a case filed in the United States District Court for Utah, Central Division, the Utah Department of Corrections agreed to expunge two disciplinary convictions that were on Hardy's prison record (*id.* at 67). These had to do with the 1981 escape. As part of that settlement, the Department also agreed to notify the Board that the disciplinary proceedings had been expunged (*id.* 68). This was done via a letter dated November 1, 1991 (*id.* at 71).[2]

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[2] This letter is to inform you that per an Order signed by the Honorable Bruce S. Jenkins, Federal District Court Judge, the inmate disciplinary report nos. 2620 and 2681 have been expunged from the USP records of inmate Edward Dale Hardy, USP No. 14736.

On September 7, 1993, Hardy sent a letter to the Board requesting that it "please amend in light of the expungement, it's [sic] previous decision of September 24, 1986 regarding my release" (*id.* at 74, emphasis in original). In December of that year, the Board considered Hardy's request in a "special attention review," a meeting of Board members where they review new information and decide whether a parole decision should be changed. The Board decided not to change the parole release date, keeping it at September 2004 (*id.* at 162). A month later, Hardy challenged this decision in a letter to the Board in which he stated that he had not requested a "special attention review," but a "new and second hearing to nullify the old, and mistakenly conducted first hearing" (*id.* at 79).

On May 6, 1996, the Board responded to a letter it had received from Hardy's attorney that requested reconsideration and rehearing due to the expungement. Board chairman Michael R. Sibbett, acting on behalf of the Board, denied the request.

> The Board has thoroughly reviewed the document, in which you provided legal counsel, and finds nothing in it to warrant reconsideration of Mr. Hardy's case or the granting of a shorter parole date.
>
> Even disregarding the disciplinary reports surrounding the 1981 escape, which you ask the Board to ignore, the fact remains that Mr. Hardy was outside the prison without permission for nearly five years, and was convicted of a new

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Id. at 71.

> felony in California during this time. The fact that the details of his escape are unclear is of little consequence to the Board's decision.

(*id.* at 91).

Subsequent to this letter, in October 1997, Hardy filed this petition for extraordinary relief, claiming entitlement to a new personal appearance hearing. The Board filed a memorandum in opposition to the petition (*id.* at 115). Hardy did not respond and the Board eventually filed a notice to submit. On September 9, 1998, the trial court entered a signed minute entry denying the request for extraordinary relief and dismissing the petition (*id.* at 173). Before the Board could prepare an order, however, Hardy moved to strike the minute entry, claiming that he had been confused by the title of the Board's memorandum in opposition and that he had never received the notice to submit for decision.[3]

The trial court agreed with Hardy's argument, struck the minute entry, and gave the Board the opportunity to file a new responsive pleading (*id.* at 221). A telephonic conference on April 13 set a hearing date of May 24, 1999 for that responsive pleading. The schedule, via a minute entry, was sent to the attorneys for both parties. On April 23, 1999, the Board filed a "motion to dismiss petition for extraordinary relief" pursuant to rule 12(b)(6), Utah Rules of Civil Procedure (*id.* at 222). Though Hardy responded to the

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[3] Hardy asserted that he was not put on notice that denial of relief and dismissal of the petition was being contemplated since the Board's memo was not framed as either a motion to dismiss or a motion for summary judgment.

motion, his counsel did not appear at the May 24 hearing. In an objection to the proposed order, Hardy's counsel claimed that he had never received the minute entry schedule and had not written down the hearing date. Denying the objections, the trial court granted the Board's motion, denied extraordinary relief, and dismissed the petition.

SUMMARY OF THE ARGUMENT

The trial court did not consider facts outside the pleadings. The trial court relied solely on facts contained in the exhibits attached to the petition to analyze Hardy's ability to establish a claim for relief. This was a proper procedure under court rules, which make exhibits part and parcel of a complaint or petition. Using those exhibits did not constitute going outside the pleadings or deciding disputed facts, but abided fully with the requirements of rule 12(b)(6) to take as true the contents of the petition.

A second, in-person, hearing was not constitutionally required. In the parole context, proposed procedural requirements are mandated only if they substantially further the accuracy and reliability of the fact-finding process. Here, the Board was not engaged in fact-finding. It accepted as true the expungements of the prison disciplinaries. The only issue before the Board was the affect those expungements should have on Hardy's parole status. Given the other, independent evidence of Hardy's escape and subsequent criminal conduct in California, a new, in-person, hearing would not have furthered the accuracy or reliability of the process. Even Hardy asserts only that a personal appearance

would have been more persuasive, not that it would have led to a better compilation of facts.

Hardy is not entitled to have *Labrum*'s due process protections applied prospectively. The Utah Supreme Court explicitly made this watershed case from 1993 prospective only. Since Hardy's original parole hearing occurred in 1986 and he did not have a pending petition when *Labrum* was decided, his quest for these benefits must be denied.

ARGUMENT

I. BECAUSE THE TRIAL COURT'S DECISION WAS BASED ON FACTS CONTAINED IN THE PETITION AND ITS ATTACHMENTS, IT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING.

Hardy's sole argument for reversal is that the trial court erred in deciding disputed facts without an evidentiary hearing. This is not correct. All the relevant facts necessary for decision were contained in the pleadings, i.e., the petition and its plethora of attachments. Under Rule 10(c), Utah Rules of Civil Procedure, exhibits are a part of a pleading "for all purposes," including evaluation of a rule 12(b)(6) motion. *See e.g., Ogden Martin Systems of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 528- 29 (7th Cir. 1999); *ALA Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 n.8 (3rd Cir. 1994); *Burns v. Gardner*, 493 S.E.2d 356, 359 n.2 (S.C. App. 1997); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1327, at 764-65 (West 1990). Thus, not only

was the trial court obligated to take all the allegations in the petition as true, but it also was mandated to take as true the facts as spelled out in the exhibits.

The exhibits contain facts relevant both to Hardy's claim that he was not given proper notice of the 1986 hearing, that the Board relied on inaccurate information, and that he was constitutionally entitled to a new, in-person, hearing as a result of the expungements. Attached to the petition are copies of letters from the Board to Hardy informing him of his 1986 parole hearing (R. 25, 27, 46). Though the first two letters refer to hearing dates eventually continued, they clearly put Hardy on notice that a parole hearing was upcoming. Also, though Hardy states he never received the letter of September 17, 1986, which informed him of the September 24 hearing, that statement is self-serving at best.[4]

The partial transcript of the September 24, 1986 parole hearing, which Hardy also appended to his petition, provides further facts from which the trial court could determine no cognizable claim for relief. Not only did he admit the fact of escape (R. 48, 56), but

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[4] Even if Hardy's claim of ignorance could create a dispute of fact, that dispute is irrelevant given (1) the previous letters, which he does admit receiving, gave him sufficient notice that he was going to be heard; and (2) in 1986, the Board was not constitutionally obligated to provide any notice. Hardy's attempt to import *Labrum*'s due process protections into the late 1980s cannot survive the supreme court's express decision not to give *Labrum* retroactive authority. Consequently, Hardy's "notice"claim is still subject to dismissal pursuant to rule 12(b)(6), Utah Rules of Civil Procedure, because it is legally flawed under either of the potential factual landscapes.

he admitted committing an assault in California after the escape (R. 56-57).[5] These admissions were not undercut by the expungement, which affected only the prison disciplinary, not Hardy's previous conduct.

Hardy's substantive claim that the expungements required a personal appearance hearing also does not mandate an evidentiary hearing. Assuming that the question cannot be resolved as a matter of law, i.e., is the Board constitutionally required to grant in-person parole hearings, in this case, the facts in Hardy's own petition show that a personal appearance hearing was not constitutionally required.

Using the facts contained in those exhibits, which govern over any conflicting allegations in the petition, the trial court was able to avoid an evidentiary hearing. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997) (when there is a dispute between allegations in a complaint and an attached exhibit, the exhibit controls). Hardy provided all the evidence the trial court needed to rule against him. *In re Wade*, 969 F.2d 241, 249 (7th Cir. 1992) ("a plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.").

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[5] These admissions are damning, regardless of Hardy's lawyerlike protests that his "escape" had been "blown out of proportion,"(R. 48), and his statement, "I won't admit to an escape but I'll admit that I left" (R. 49).

II. EVEN IF THE PRISON DISCIPLINARY EXPUNGEMENTS OBLIGED THE BOARD TO RECONSIDER ITS PREVIOUS PAROLE DECISION, THE SPECIAL ATTENTION REVIEW FULFILLED THAT OBLIGATION.[6]

Before the trial court and this Court, Hardy asserts that the Department of Corrections' stipulation to expunge disciplinary records required that the Board nullify the 1986 hearing and give him a new personal appearance hearing. However, this was not what Hardy initially requested of the Board. Shortly after the expungement, Hardy wrote the Board and asked it to simply "amend" the parole decision the Board had issued in 1986. He did not ask for a personal appearance hearing.

The Board, however, did re-evaluate Hardy's parole in light of the expungements in a "special attention review," which it held on December 14, 1993. According to the Board's administrative rules, special attention reviews examine special circumstances involving information not previously considered, but that may warrant a change in status. Utah Admin. Code R671-311-1 (1993).[7] These reviews are based on written reports and do not provide for a personal appearance. Utah Admin. Code R671-311-3 (1993).

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[6] Though Hardy's failure to make any other arguments in his brief should be fatal to his appellate challenge, in case the Court decides to review the merits of the case, Points II, III, and IV address them. *See Pasquin v. Pasquin*, 988 P.2d 1, 6 (Utah App. 1999) ("Issues not addressed are deemed waived and abandoned.").

[7] This rule has not changed since 1993. *See* Utah Admin.Code R671-311-1 (2000).

Hardy argues that this review failed to afford him necessary due process. That argument fails because it is not in line with precedents regarding due process in parole hearings. "The touchstone of due process in the context of parole hearings is whether the proposed procedural due process requirement substantially furthers the accuracy and reliability of the Board's fact-finding process." *Neel v. Holden*, 886 P.2d 1097, 1103 (Utah 1994). Consequently, Hardy's demand for a second personal appearance hearing must be examined in light of this test: whether a new personal appearance hearing would have substantially furthered the accuracy and reliability of the Board's fact-finding process.

Two decisions from Utah's appellate court's guide this examination. First, the high court's decision of *Padilla v. Utah Bd. of Pardons and Parole*, 947 P.2d 664, 667 (Utah 1997), in which an inmate asserted that due process demanded the assistance of an attorney to ferret out and rebut inaccurate information. The supreme court rejected Padilla's plea for counsel in part because he failed to state the "inaccurate information" upon which the Board allegedly relied. More important for this case, however, was the court's ruling that Padilla could not explain how an attorney would have "substantially furthered the accuracy and reliability of the Board's process.

Hardy's argument is similarly flawed. He asserts that a personal appearance would be more persuasive. However, Utah courts have never held that due process requires that inmates seeking parole be given the most persuasive forum, only that the

process ferret out accurate and reliable **facts**. This said, Hardy also misapprehends the purpose and function of the special attention review. It is not to find facts, but to determine whether new facts should affect parole status. Under the precedents so far decided, procedural due process of the sort Hardy posits might not even apply to what is little more than a meeting of the individuals authorized to grant or deny parole. Given the Utah Supreme Court's long-established refrain that it does not sit as a panel of review, it is unlikely that such due process would apply. *Lancaster v. Utah Bd. of Pardons & Parole*, 869 P.2d 945, 947 (Utah 1994) (courts do not review or modify the Board's substantive parole decision).

The second case that illuminates Hardy's argument and highlights its flaws also involved the inmate Padilla. There, a Board member who was related to Padilla's victim announced her conflict in front of other Board members after the personal appearance hearing had started. *Padilla v. Utah Bd. of Pardons*, 839 P.2d 874, 875 (Utah App. 1992). She then left the podium, where the other members of the Board were sitting, and went down into the audience to sit with the victim's family.

This is the only case where an appellate court found such an egregious violation of due process that it ordered a new, in-person, hearing. *Id.* at 876-77. This Court drew on supreme court precedent and declared that "due process demands a new trial when the appearance of unfairness is so plain that we are left with the abiding impression that a

reasonable person would find the hearing unfair." *Id.* at 877 (quoting *Bunnell v. Industrial Comm'n*, 740 P.2d 1331, 1333 n.1 (Utah 1987).

Even assuming the truth of Hardy's allegations, the process that occurred here does not compare with that discussed in the first *Padilla*. Given the facts before the Board, Hardy's admission of having escaped, and the prompt special attention review given after Hardy requested reconsideration, there is not even an appearance of unfairness.

III. BECAUSE THE BOARD HAS SOLE DISCRETION TO DETERMINE THE WEIGHTS THAT SHOULD BE ACCORDED DIFFERENT ITEMS OF EVIDENCE, ITS DECISION NOT TO CHANGE HARDY'S PAROLE DATE IS NOT SUBJECT TO JUDICIAL SECOND-GUESSING.

Stripped to its essentials, Hardy's claim is nothing more than a challenge to the Board's parole release decision. His argument is much like the one crafted by the inmate in *Padilla*, where he asserted that "because the Board granted him the same rehearing date [following a judicially-mandated new original hearing], an adequate inquiry into the merits of his case could not have been made. 947 P.2d at 669. The *Padilla* court quickly disposed of the challenge, concluding that it would require precisely the kind of substantive review that it had consistently rejected. *Id.*

The same is true here. The expunged disciplinaries were not the sole basis for the Board's apparent conclusion that an escape had occurred. In fact, the expungements only

excised an insignificant part of the evidence showing Hardy's detour and frolic. By far the most significant evidence was Hardy's own admission in the 1986 Board hearing (R. 48, 56) that he "left" Utah prison property and was eventually found in California. This evidence remained securely in place after the expungements and was a sound base for the parole board's renewed decision to deny parole until September 14, 2004.

Since there was evidence before the Board of an escape, it was free to conclude that an escape had occurred. *See Walker v. State*, 902 P.2d 148, 150 (Utah App. 1995) (concluding that, since Board's decision was "supported by evidence," the trial court should have deferred to its interpretation of the evidence and the weight to give it).[8]

IV. HARDY'S CLAIM THAT HE WAS ENTITLED TO THE DUE PROCESS PROTECTIONS ESTABLISHED IN *LABRUM* MUST FAIL BECAUSE THE ORIGINAL PAROLE HEARING OCCURRED BEFORE THAT DECISION, WHICH HAD ONLY PROSPECTIVE EFFECT.

Hardy claims error by virtue of the Board's alleged failure to provide him with sufficient notice of his September 24, 1986 original parole hearing. He also makes various claims that the Board failed to provide him with information in its file before that hearing so that he could review and rebut it.

Regardless of the merits of Hardy's claim, his allegations fail to establish a claim for relief because it runs afoul of the non-retroactivity provisions of *Labrum v. Utah Bd.*

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[8] This language suggests that the Board's substantive decisions could be reviewed and reversed only if they were completely lacking in foundation.

of Pardons, 870 P.2d 902, 913 (Utah 1993). There, the supreme court for the first time mandated notice and disclosure in original parole grant hearings. However, the court declined to make that decision retroactive. "To now declare invalid each original parole decision held in accordance with past law would work a fundamental injustice on the Board, the judiciary, and the citizens of this state." *Id.* Hardy's hearing occurred in 1986 and, therefore, was not subject to the notice and disclosure requirements.[9]

CONCLUSION

The Court should affirm the trial court's order denying Hardy's request for extraordinary relief and dismissing the petition.

REQUEST FOR ORAL ARGUMENT AND PUBLICATION

The Board requests oral argument and publication. This case presents two issues that have not previously been addressed by this Court or the Utah Supreme Court: (1) the use of exhibits in rule 12(b)(6) proceedings; and (2) whether in-person appearance hearings are constitutionally required in factual situations such as those addressed in this

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[9] Though these requirements technically were not mandated in 1986, the Board informed Hardy of his September 24 hearing by letter dated September 17. Again, this letter is attached to the petition (R. 46). Additionally, Hardy knew that an original parole grant hearing was coming up because it was originally scheduled for September 9 1986 and he never disputes that he had notice of that date.

case. The Board believes publication of an opinion would be useful for practitioners and the courts and to assist in the evolution of Utah law.

RESPECTFULLY SUBMITTED THIS 24 March 2000.

JAN GRAHAM
UTAH ATTORNEY GENERAL

JAMES H. BEADLES
Assistant Attorney General

CERTIFICATE OF MAILING

On 21 March 2000, I mailed, by U.S. Mail, postage prepaid, a copy of this **BRIEF OF APPELLEE** to:

CRAIG S. COOK
3645 E. Cascade Way
Salt Lake City, Utah 84109

ADDENDA

ADDENDUM A

JAMES H. BEADLES (5250)
ASSISTANT ATTORNEY GENERAL
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
(801) 366-0353

ORIGINAL
FILED DISTRICT COURT
Third Judicial District
JUL 26 1999
SALT LAKE COUNTY
By /S/
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH

EDWARD DALE HARDY, II, PETITIONER, v. UTAH STATE BOARD OF PARDONS & PAROLE; SCOTT CARVER, Warden, Utah State Prison; LINDA CLARKE, Warden, California Training Facility, RESPONDENTS.	*ORDER DISMISSING PETITION FOR EXTRAORDINARY RELIEF* **CASE NO. 970907422 HC** **JUDGE TIMOTHY R. HANSON**

Before the Court is a request for decision filed by the respondent seeking a ruling on its Motion to Dismiss Hardy's petition for extraordinary relief. This case concerns the petitioner's request for extraordinary relief based on the Utah State Board of Pardon's alleged reliance on improper information at the petitioner's September 24, 1986, parole hearing. The petitioner also alleges that he was not given sufficient notice of the September 24, 1986 hearing, in violation of his due process rights.

After the reviewing the Petition, the Court found that it was not frivolous on its face and ordered the respondent to file a responsive pleading. After being granted an extension of time in which to respond, the respondent filed the Memorandum in Opposition. The petitioner did not reply to the respondent's Memorandum and, consequently, the Court issued a Memorandum Decision dismissing the petition. Counsel for petitioner moved to reopen the case, claiming that he had not received the notice to submit for decision. The Court, therefore, vacated the Memorandum Decision and the respondent was afforded the right to file a motion to dismiss, which it did. Counsel for petitioner filed a response but did not appear at the hearing, which had been scheduled during a telephonic conference with all parties. Having considered the allegations contained in the petition, respondent's motion to dismiss, and petitioner's reply, the Court denies the request for extraordinary relief and dismisses the petition for the reasons stated in this Order.

FACTUAL AND PROCEDURAL BACKGROUND

The petitioner plead guilty to first degree murder on September 20, 1979. On September 28, 1979, the petitioner was sentenced to serve a life sentence in Utah State Prison. The petitioner escaped from the Utah State Prison on May 23, 1981. Later that year, the petitioner was arrested in California and charged with aggravated assault and use of a firearm in the commission of a crime. The petitioner was convicted of that crime by a jury.

In February, 1986, the petitioner was released from California and returned to the Utah State Prison. The petitioner's original parole hearing was October 1, 1980. The rehearing was scheduled for September 9, 1986. This date was subsequently continued until September 24, 1986. According to Exhibit F of the respondent's Memorandum, the petitioner was sent notice of the September 24, 1986 hearing on September 17, 1986. Following his September 24, 1986, hearing, the petitioner was given a parole release date of September 14, 2004.

On November 1, 1991, the Board of Pardons was informed that two disciplinary reports, concerning the petitioner's escape from prison, had been expunged. On September 7, 1993, the petitioner requested that his parole release date be amended on the basis that the two disciplinary reports had been expunged. On December 14, 1993, a special attention review was conducted by the Board of Pardons. At the hearing, the Board of Pardons determined that the petitioner's parole date would not be changed.

LEGAL ANALYSIS

In his Petition, the petitioner alleges that his due process rights were violated at the September 24, 1986, hearing, because he was not given an adequate notice of that hearing and because the Board of Pardons relied on the two disciplinary reports that were subsequently expunged. The petitioner seeks a new hearing at which those Board members who were aware of the expunged records are replaced by pro tempore members.

Respondent sets forth several grounds for which it believes that Petition should be dismissed. First, the respondent contends that the petitioner has not demonstrated that his rights were substantially violated by the Board of Pardons' actions. *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995). Second, the respondent maintains that the petitioner was given adequate notice of the September 24, 1986, hearing. Third, the respondent contends that the petitioner's inadequate notice claim is subject to dismissal for untimeliness. Fourth, the respondent argues that the Board of Pardons could validly rely on the two disciplinary reports at the time of the September 24, 1986, hearing. In addition, the respondent asserts that the petitioner has not met his burden in demonstrating that the Board of Pardons' reliance on the two disciplinary reports was not only erroneous, but also harmful error. *See Monson v. Carver*, 928 P.2d 1017, 1030 (Utah 1996). Finally, it is the respondent's position that the petitioner has not demonstrated extraordinary circumstances meriting the appointment of a pro tempore member of the Board of Pardons to hear his case. Utah Code Annotated §77-27-2(g) (1996).

Having carefully considered the law and facts in this case, the Court determines that there is no basis to grant extraordinary relief under Rule 65B in this case. Based on the information before this Court, no evidence has been offered which would show that the Board of Pardons exceeded its jurisdiction, failed to perform an act required of law, or violated the petitioner's procedural due process rights. Specifically, the Court finds that the petitioner was given adequate notice of the September 24, 1986, hearing, as evidenced by the September 17, 1986,

letter to the petitioner informing him of the September 24, 1986, hearing. Moreover, the petitioner's claim that he was given inadequate notice is untimely, having been brought over eleven years after the September, 1986, hearing. *See Renn*, 904 P.2d at 684.

Additionally, the two disciplinary reports were properly before the Board of Pardons at the time of the September, 1986, hearing and could have been validly considered. Furthermore, there is nothing to suggest that the two disciplinary reports made a difference in the Board of Pardons' decision with respect to the petitioner's parole date. Clearly, the Board of Pardons was aware of the petitioner's escape from prison not only from newspaper accounts, but from the petitioner's own admission that he escaped. Thus, even if the Board did not have the two disciplinary reports before it, there was other ample evidence of the petitioner's escape.

It further appears to this Court that, in actuality, petitioner is requesting rights that the Utah Supreme Court first enunciated in *Labrum v. Utah Bd. of Pardons*, 870 P.2d 902 (Utah 1993). However, that procedural guarantees set forth in that case apply only to parole hearings occurring after its issuance. Since petitioner's hearing took place in 1986, the Board cannot be faulted for failing to comply with standards that were not then in place. *Id.*, at 911 ("To now declare invalid each original parole decision held in accordance with past law would work a fundamental injustice. . . .").

Conclusion

The request for extraordinary relief is denied and the petition dismissed.

DATED THIS 26 July ~~June~~ 1999.

BY THE COURT

Timothy R. Hanson
Third District Court Judge

CERTIFICATE OF MAILING

On 10 June 1999, pursuant to rule 4-504, Utah Rules of Judicial Administration, I mailed, by U.S. Mail, postage prepaid, a copy of this proposed order to:

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

James H Beadles

ADDENDUM B

MEMBERS

GARY L. WEBSTER

VICTORIA J. PALACIOS

DENNIS M. FUCHS

THE STATE OF UTAH

BOARD OF PARDONS
6065 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84107
(801) 261-2817

PAUL W. SHEFFIELD
Administrator

C 9

September 17, 1986

Edward Dale Hardy USP# 14736
Utah State Prison
P.O. Box 250
Draper, Utah 84020

Dear Mr. Hardy:

This is to notify you that you are scheduled for a Rehearing on September 24, 1986. You were continued for a three member Board. Please be prepared to appear on the above date.

Sincerely,

Anthony King
Hearing Officer

/alk

cc: Sharon Fronk

Exhibit 5

MEMBERS

GARY L. WEBSTER

VICTORIA J. PALACIOS

DENNIS M. FUCHS

THE STATE OF UTAH

BOARD OF PARDONS
6065 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84107
(801) 261-2817

PAUL W. SHEFFIELD
Administrator

Aug. 8, 1986

Edward Dale Hardy, USP#14736
P. O. Box 250
Draper, Utah 84020

Dear Sir:

Your initial Parole Grant Hearing before the Utah State Board of Pardons is scheduled for September 9, 1986.

Presently, the Board staff is gathering pertinent information in your case from the Courts, Law Enforcement agencies and other sources which will be used in order to provide you with a fair hearing. This may require that a member of our staff interview you prior to your scheduled Board appearance. If the Board determines that a pre-board interview is necessary, a date and time for the interview will be arranged for you through your assigned prison caseworker.

Any written information or documentation you wish the Board to consider should be forwarded to the Board two (2) weeks in advance of your scheduled hearing.

GENERAL INFORMATION

1) Within 14 days prior to your Hearing, you will be advised, in writing of the date your hearing is scheduled.

2) Normally, hearings are conducted by three Board Members. Occasionally, only two members can be present. In order to be heard by a two-member Board, you must first sign a Waiver acknowledging that you agree to appear before a two-member Board. The Waiver form will be available to you the day of your hearing.

3) Hearings will be conducted at the Utah State Prison beginning at 8:30 a.m.

VISTORS

1) Board hearings are open public meetings which means anyone interested, including the Press will be allowed to attend.

2) In order to allow the Board time enough to hear all cases on one calendar, only two of your vistors will be allowed to speak on your behalf. However, other vistors will be allowed to be present in the Hearing Room.

3) On all Rehearings only one visitor will be allowed to speak on your behalf.

4) Visitors under thirteen (13) years of age will not be allowed into the Hearing Room.

5) The Board attempts to hear cases with vistors during the morning hours. Please advise your vistors to be available at the Hearing Room no later than 8:30 a.m. the day of your Hearing.

6) At the conclusion of your Hearing, you will be advised both verbally and in writing, of the Board's decision in your case.

PAUL W. SHEFFIELD, Administrator

Delivered by USP mail 8/21/86 A.M.
C-9

MEMBERS

GARY L. WEBSTER

VICTORIA J. PALACIOS

DENNIS M. FUCHS

THE STATE OF UTAH

BOARD OF PARDONS
6065 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84107
(801) 261-2817

PAUL W. SHEFFIELD
Administrator

Exhibit 6

August 12, 1986

Edward Dale Hardy, USP#14736
P. O. Box 250
Draper, Utah 84020

Dear Sir:

Your initial Parole Grant Hearing before the Utah State Board of Pardons is scheduled for September 10, 1986 (Amended Date).

Presently, the Board staff is gathering pertinent information in your case from the Courts, Law Enforcement agencies and other sources which will be used in order to provide you with a fair hearing. This may require that a member of our staff interview you prior to your scheduled Board appearance. If the Board determines that a pre-board interview is necessary, a date and time for the interview will be arranged for you through your assigned prison caseworker.

Any written information or documentation you wish the Board to consider should be forwarded to the Board two (2) weeks in advance of your scheduled hearing.

GENERAL INFORMATION

1) Within 14 days prior to your Hearing, you will be advised, in writing of the date your hearing is scheduled.

2) Normally, hearings are conducted by three Board Members. Occasionally, only two members can be present. In order to be heard by a two-member Board, you must first sign a Waiver acknowledging that you agree to appear before a two-member Board. The Waiver form will be available to you the day of your hearing.

3) Hearings will be conducted at the Utah State Prison beginning at 8:30 a.m.

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4) Visitors under thirteen (13) years of age will not be allowed into the Hearing Room.

5) The Board attempts to hear cases with vistors during the morning hours. Please advise your vistors to be available at the Hearing Room no later than 8:30 a.m. the day of your Hearing.

6) At the conclusion of your Hearing, you will be advised both verbally and in writing, of the Board's decision in your case.

PAUL W. SHEFFIELD, Administrator

EDWARD DALE HARDY - #14736
REHEARING: 9-24-86

WEBSTER: Good morning. The time set for the, actually for rehearing in the case of Edward Dale Hardy, USV14736, is that right? Sir, I ask you to answer out loud.

HARDY: All right.

WEBSTER: The mike needs to pick up, okay. You were sentenced here for the crime of criminal homicide, it's a capital offense with a live sentence. Is that correct?

HARDY: Yes.

WEBSTER: And you were first committed here in October of 1979 and at your original hearing you were given a rehearing for last October of 1985. In the interim, after you served about 18 months, apparently there was an escape involving taking an officer in maximum security (inaudible), you left and had been incarcerated in the California prison system during the interim period, is that correct?

HARDY: Uh, I was in California, yes. As far as the elements surrounding this escape, it's been blown out of proportion as my memory recollects.

WEBSTER: Well, the information we have, and I have your disciplinary report here, uh, that you were heard on, I understand, for some reason it was dismissed with the, it was overruled and there is a conviction for the escape and we have the reports on the escape and I am repeating to you the report as we have them, and giving you an opportunity to. . . I notice in your application or on your board report you do not acknowledge the escape took place. But the fact remains that you left this institution and were gone for some 57 months or something to that effect. Do you want to comment on it?

HARDY: I was never given a hearing on this write-up here. I went, asked for a dismissal, it was dismissed, it was never discussed there. I was given no notice of Captain House's appeal on that. That hearing was held without me.

WEBSTER: Okay, well this Board is not going to get into the internal working of the disciplinary process here because we are going to, I think, note that the escape, that it took place, you were not here in this institution as per sentence, for some period of time, and the record tells us that you were incarcerated in the California prison system for the interim period. Do you want to acknowledge that? Fine, you can acknowledge it, if not we can maybe play some word games about it.

HARDY: No, listen I'm not playing word games, what I said, or what I was trying to express is the elements surrounding that escape never took place. The elements . . .

WEBSTER: You're not saying—you're saying the manner in which

HARDY: Right.

WEBSTER: the hostage denied the change of clothes, the taking of the officer with you in his car didn't take place.

HARDY: No, no.

WEBSTER: Okay. Do you want to offer an explanation at this point to the Board? Your version.

HARDY: Uh, what of this right here? The escape? Uh, there was no hostage taken, there was no weapon used, and that was never proven really. The hearing was held without me, I won't admit to an escape but I'll admit that I left. I didn't leave in that manner of what they said.

WEBSTER: Okay. Uh, previous day, we'll go back, regarding the crime for which you're here, I'm just going to briefly serve the audible record. I think that your prior hearing, the detail of the crime that brought you here, was discussed, but this basically was a shooting of the victim outside a bar apparently during a drug deal, and we do have your comments in your application indicating that you feel like the plea bargain and the life sentence is unjust. That it was not a capital offense, but nonetheless you were charged, there were multiple charges and I guess you pled to the capital rather than go to trial because of the other charges pending.

HARDY: Yes.

WEBSTER: I did have one question. There was an attempted homicide pending in Salt Lake, what was that?

HARDY: I was never charged with that

WEBSTER: An attempted criminal homicide in Salt Lake County?

HARDY: No, the only charges I had in Salt Lake County regarding that whole thing there, that's why I maintained that I was duped into pleading guilty. I was charged with the three gun thefts in Salt Lake County.

WEBSTER: Okay.

HARDY: The record will reflect that, but on the expiation agreement they said I was charged with a burglary, attempted criminal burglary

WEBSTER: Yeah, that's what I had read here in your record, is the nature of your plea bargain. I've read that.

HARDY: Right, the nature of the plea bargain had that on there but the arrest report and the arraignment, I was only arraigned for the three gun thefts and an auto theft out of Davis County.

WEBSTER: Excuse me, that's, you know that's

HARDY: My co-defendant in that was charged with the attempted criminal homicide and burglary. I wasn't charged with that, but they used that in the expiation agreement. I didn't find out until years later.

WEBSTER: Okay. Uh, you know, because of the escape and the situation in California, your case seems to be complicating itself rather than straightening itself out. Uh, we don't have much of a record to go on since your return to California—we do have an Information from the California prison system regarding some of your adjustments, etc. down there. Is the Board, or the institution here in anticipation that the Board would move forward with the last October 1985 rehearing attempted to secure information. Se we do have that down there. A couple of things that I just wanted to point out in that record. One is that I think you were first in Fulsome and then in San Quentin? Is that

HARDY: No, I was in San Quentin first and then transferred to Fulsome.

WEBSTER: Okay. You did get your GED while you were down there—

HARDY: High school in San Quentin and GED in Fulsome.

WEBSTER: Okay, well good because I wasn't picking up on the high school. Uh, there was some indication that you had had your fair share of some disciplinary record down there as well.

HARDY: Four I believe,

WEBSTER: Um hum,

HARDY: Or three, there was three disciplinary on that report there from Mr. Chikirpa(?). There is a thing in there about assaulting an inmate, ah, I was taken to the hole for twelve days for an investigation. They rolled up about twenty of us and they put us all loose except for two guys. You know that was not part of a disciplinary, I was taking the max for that, for an investigation along with other people, but

WEBSTER: Did you work while you were in the California system?

HARDY: The whole time, yes.

WEBSTER: What was your work assignment?

HARDY: I was working on the yard crew.

WEBSTER: Okay, landscaping?

HARDY: Yeah.

WEBSTER: Cleaning, things like that. Okay, one thing I noticed in your background, I'm switching back and forth now, out of the prison adjustment; I noticed in your background that you have what I would describe as an outstanding record in the military. Several awards and everything; and your criminal history looks like it really started almost as a consequence of your involvement in the Vietnam thing.

HARDY: That's what I believe, I've never used that as a cop-out,

WEBSTER: Your drug dependency and affiliation with drugs started I guess then and carried on into your civilian life after your discharge?

HARDY: Uh, no, I wasn't using drugs when I first got back, I was drinking pretty heavy and

WEBSTER: I used that interchangeable

HARDY: And then after a couple of years after I came back, I started getting back into drugs again.

WEBSTER: Okay. Uh, back to this original crime, the one for which you're here. How heavily were you involved in dealing?

HARDY: Pardon me.

WEBSTER: How heavily were you involved in dealing? This was particularly a drug deal gone bad?

HARDY: Uh, I never really was into dealing drugs. What happened this night was a friend of a friend, I knew the guy but he was more of a friend to a friend of mine—had some marijuana he wanted to sell, asked if I knew anybody, I made a few calls and this Kurt Cordary(?), uh, he was a friend of a friend of mine, I had no financial interest in it or nothing—I was doing a friend a favor, just hooking something up for guy and I went along with them. The thing was I robbed this guy's dope connection a couple of days earlier, Kurt Cordary's drug connection, and while I was calling on the phone setting this thing up for these people, I was told that Kurt Cordary was paid to kill me for robbing his dope connection and that I should bring a gun. I was pretty loaded that night too. And I told the guy that was with me what was happening, he says then tell them we're not even going to go, so I told the guy over the phone and I let myself get talked into going. He talked me into taking a gun over the phone, I took the gun there

WEBSTER: That was a shotgun?

HARDY: Yeah. And the guy pulled a gun on me, I know there was no gun ever found, but the guy did pull a gun on me. I didn't mean to shoot him, I meant to pump the shotgun, I didn't even know it was loaded

at first. The gun was just handed to me when I was sitting in the car and I went to pump the shotgun and it went off.

WEBSTER: Uh, let's just turn now to your adjustment since you've been back. You've been back here since March I believe?

HARDY: About six months.

WEBSTER: About six months. Uh, I haven't had a chance to go through your prison record, I did take a look at and asked the institution to provide the Board with the documents regarding the disciplinary finding on the escape. I did that because of your comments not acknowledging it. Have you had any other convictions in a disciplinary?

HARDY: Uh, I was found not guilty of bars being cut on my cell, and that was reversed also to guilty without my knowledge or without providing me a hearing, and I got a write-up

WEBSTER: How long, let's just stop. I want to talk with you, this is the maximum when all the bars were found cut?

HARDY: No, this was about two months ago, back in July.

WEBSTER: Okay, were you the only one that was written up for having bars cut?

HARDY: No, there were three people.

WEBSTER: Okay, this is the one I think that hit the news media, that I have

HARDY: I believe so, I think it was in the news,

WEBSTER: Uh, yeah that was reversed? How long had you been living in that cell?

HARDY: About six weeks, I guess.

WEBSTER: Six weeks. Uh, seems like a pointless question, but did you know the bars were cut?

HARDY: No. No there were three sets of bars cut, I was the only one found guilty. One guy was never heard, he's the one who admitted to cutting my bars because he had lived in there a couple of months

before I moved in, and he admitted to cutting other bars and they found that guy not guilty. The guy who admitted it was never heard on his write-up. I was found not guilty and then it was reversed.

WEBSTER: That was reversed? Okay. You said there was another disciplinary conviction? I cut you off because I want to talk about that.

HARDY: Yeah, that was for passing legal material. We're not supposed to pass anything over there. I was passing legal material to some other inmates and I got a write-up for it.

WEBSTER: And what was the disposition?

HARDY: Guilty on passing legal material. I was written up for yelling and threatening, which I never did. I was found not guilty of that but found guilty of passing legal material.

WEBSTER: Okay. That's the one, I did look at your prison file and noticed that report and didn't get a chance to get a complete reading.

HARDY: I spoke with Mr. Robinson yesterday to clarify the write-up that came back. The photocopy didn't say nothing about the passing of legal work, it just said the _____26. And I asked them about it and that's an act that threatens the security of the institution.

WEBSTER: Okay. And you don't have any visitors here with you, but the reports tell us that you do have a very supportive support system should you be granted a release date.

HARDY: I have a very supportive family.

WEBSTER: You have a wife and a child,

HARDY: Two boys

WEBSTER: Two? Okay, for some reason I thought there was just one. They are living in California?

HARDY: Yes.

WEBSTER: And your wife apparently owns her own business according to the information we have, also, and this is new in the record, are you, you are apparently a partner in a trucking firm?

HARDY: Yes. I have been for years. I believe I said that the last time I was here.

WEBSTER: Okay. I didn't pick that up, it came to my attention later on in the file material, it may have been. That would be your source of income, is the trucking firm?

HARDY: Since I've been out there

WEBSTER: Do you take an active part in the management of that firm now, or are you taking a passive that you're in prison, this is the situation?

HARDY: Yeah, I can't work, I've got no income coming from it. It's set up like that.

WEBSTER: Is there a joint ownership or something?

HARDY: Yeah, my father owns 51% and I own 49%.

WEBSTER: Okay, all right. I'm not going to, I don't think that I have any further questions just let me look at my other notes here in going through your record. The only other question that I have, it looks like I know that you're not happy about being in prison, I know that you feel like this sentence of life is not fair and all, but it looks like to me you're continuing to try and resist and fight the system with the disciplinaries and all. I'm wondering if you want to comment on that?

HARDY: Uh, these last two disciplinaries as far as the bars and this passing of legal materials, the legal material I'll always pass regardless of whether it's against the rules or not. If a guy needs help and I can help him out, I'm going to do it. I don't see anything threatening to the security of the institution. As far as cutting the bars, I didn't do that, I was found not guilty. I have my own beliefs as to why all this stuff has happened as far as the write-ups. I've questioned Captain House until I got my first write-up about why I was in max, what evidence. And he's always stated, he didn't need evidence, he could house me there. Right about four days after I asked that question the

first time is when he wrote this up here. And I believe it's a conspiracy by Captain House. I may be paranoia but I truly believe that Captain House is just trying to accumulate evidence in order to keep me over there.

WEBSTER: Okay, then let me turn to the other board members and see if they have some questions.

HARDY: Okay.

WEBSTER: Ms. Placeos

PLACEOS: I just have one question Mr. Hardy. Um, you, it goes to the escape. You have no new conviction, you have no disciplinary convictions that I can see or acknowledge, but at the same time we have what I think you are acknowledging and that is a prima facie case of escape. You were in custody, you had no legal order to be out of custody, and you ended up out of custody.

HARDY: Yes.

PLACEOS: Now, we have a report, a rather detailed report that tells us about all of the things that you did. That's the only information we have. If you would have us believe that Scotty beamed you outside those walls, that's fine. But if you would prepare, to present to us an explanation of how you got outside the walls, I'd be happy to hear it. Otherwise all I have is the report that I've got.

HARDY: No, I'd rather not comment.

PLACEOS: That's fine. I have nothing further.

FUCHS: Mr. Hardy, I guess my main concern is, um, there was a murder that occurred here, and then you end up in California after leaving the institution by whatever means occurred, then you end up in California being arrested again for a sawed-off shotgun, you were using that in the commission of a crime and that kind of concerns me. How come you get out of here and kind of basically start the same kind of behavior again in California?

HARDY: Circumstances were a little bit different. Uh, I didn't really use the shotgun, there was one there, I didn't use it. What happened in

California was basically a fist fight. There was no burglary in the larcenous sense. I'd been living at that house, paying rent there. I'd babysat earlier that day and this guy and this girl, they were boyfriend and girlfriend lived together. The girl had a four-year old boy I was babysitting him earlier that same day. And we was out on the front porch and he was riding his little big wheel around. This was in July so I told him, why don't you take your shirt off, it's kinda hot. He took his shirt off and he was full of bruises and I asked him what happened. He told me his dad hits him, his mom's boyfriend. Well, I was mad about that. That's the main thing why I went, why I beat the guy up so bad. I hit him with my fists, my hand's still messed up, I broke my hand. As far as the use of the gun I didn't use the gun, there was one there but there was not one used.

FUCHS: Was it your gun?

HARDY: No,

FUCHS: It was just in the house you claim?

HARDY: No, it was borrowed from somebody.

FUCHS: Well, I appreciate that explanation, thank you.

WEBSTER: Anything further?

FUCHS: No.

WEBSTER: Mr. Hardy, one of the things that I, in the earlier part of the hearing that I did not mention, is that there is correspondence in the file, very supportive correspondence giving us some greater appreciation, I guess, for your relationship with your wife and family. Very supportive and it looks like you have, as I said earlier, a good support system out there. We do have letters in the file updating us and telling us of that relationship. Uh, the Board's guidelines that we use, both the old guidelines and the time period reference so I can't tell you that the guidelines suggest you service "X" number of years or whatever because they don't address that issue. Do you have anything that you would like to say before we close the hearing?

HARDY: Uh, after your decision is there any chance of you recommending I be sent back to California?

WEBSTER: Okay, uh, the thing that I would tell you is that it looks like you have your family and your support system there and the responsibility for working out a compact of inmate transfers between the two prison systems is not the Boards', I don't think this Board would have any objection though to you compacting as an inmate to California where your support system is.

HARDY: I've been asking since I've been back and getting ignored about the whole thing. I've asked to either go to a federal system where they have that delayed stress program or back to California. I just get ignored.

WEBSTER: Well, uh, we have an institutional representative here, and she's heard this part of the hearing and I would consider that it's something that she is in a position to follow up on. Do you have anything further, if not we'll ask you to step off.

WEBSTER: Okay, Mr. Hardy, the Board's decision is to grant a parole but it will be sometime off. We debated whether or not to grant another rehearing and after discussion we felt that to give you a full date right up front and tell you that you can apply for redeterminations and possibly have an opportunity to change that, you know, it's up to you. But the date is after your service of a total of twenty years, actually 18 years from now. Eighteen years from now, that is September 14, 2004. It will be the total service of twenty years, we are not granting credit for the time in custody in California. Okay?

HARDY: All right.

WEBSTER: Thank you.

Exhibit 13

Utah State Board of Pardons
488 East 6400 South
Murray, Utah 84107

9-7-93

Edward Dale Hardy II
H-11980
P.O. Box 600
Tracy, Calif. 95378-0600

Honorable Members of the Board,

On September 24,1986, I appeared before the Utah State Board of Pardons, at which time I was granted a release date of September 14,2004.

During the course of that hearing, several references were made to information contained in two seperate Utah State Prison Inmate Disciplinary Reports, to which I made several attempts to explain that the accusations and results contained in the Disciplinary Reports were incorrect, untrue, and illegally determined.

I subsequently pursued my contentions and position in that regard, and ultimately obtained an Expungment Order of the Disciplinary Reports.

It is my sincere belief that the majority of weight and consideration given toward deciding my release date, was based on the information that has since been expunged, and I respectfully submit that the record supports my belief.

With the foregoing in mind, I respectfully and humbly pray that, without being statutorily assessed for a re-determination under provisions of the Utah Code, The Honorable Members of the Board of Pardons please amend, <u>in light of the expungment</u>, it's previous descision of September 24,1986 regarding my release.

I am presently serving the remainder of my Utah sentence in the California Department of Corrections under provisions of the

Interstate Corrections Compact, and can be contacted by mail at;

Edward Hardy, H-11980
P.O. Box 600
Tracy, Calif. 95378-0600

Respectfully Submitted,

Note: I've enclosed for the Board's convenience, A certified transcript of my September 24,1986 appearance before the Board, with references to the expunged information in highlight, aswell as the Certificate of Expungment and related letter from Director Deland.

Exhibit 14

Januarv 22,1994

Dear Mr. Sibbett,

On 1/21/94, I received from you, a "Before the Board of Pardons of th State of Utah" form dated 12/14/93, which contained extremely vague results of a " Special Attention Review " that you conducted regarding my Utah sentence.

I have never written to you, or any other Board member indicating tha I would like a Special Attention review of my sentence, and I do not feel that I should be penalized and assessed for one.

My 9/7/93 letter to the Board specifically asked that my sentence be corrected due to the mistake made by the Board regarding information it had requested to be created, for use against me at my 9/24/86 re-hearing. (Please ref to the transcript that I sent you in my 9/7/93 letter). I asked that my sentenc e amended in light of and only in light of the Expungment Order issued by Judg e Kins.

I had made my request based on Chairman Pete Haun's assurance that par le decisions are not based on allegations or aquittals, and that once informat s found to be erroneous, I could ask for a second hearing. Please read the Aug st 12,1990 Salt Lake Tribune article of an interview with Mr. Haun that I've er losed.

A new and second hearing to nullify the old, and mistakenly conducted irst hearing is what I had requested, so that my parole date could be corrected his I swear to under penalty of perjury.

Also in my 9/7/93 letter, I specifically requested that I not be pena- zed or assessed for a determination under the provisions of Utah. The same ovision which Special Attention reviews are Catergorized under.

If my intent was to be given a " Special Attention Review", I'd have pre ted an extensive, thorough and extremely detailed documentation and analysis my many program and work accomplishments, as well as my personal family tra- dies that have

under penalty of perjury.

These types of circumstances are what is to preceed information previously considered, when applying for Special Attention. Please refer to Redeterminations/Special Attentions policy and procedures.

There's no way that I would have requested a " Special Attention Review" with only information not previously considered, without also citing the circumstances that are required to preceed it. This fact I also swear to under penalty of perjury.

With the foregoing in mind, I respectfully request that you plea and forthwith, vacate, nullify and void the 12/14/93 " Special Attention Rev that you have conducted and penalized me for?

If you have honestly and sincerely interpreted my 9/7/93 letter and my present request to be a request for a " Special Attention Review"of m sentence, would you at least please and forthwith mail to me at my enclosed ess, a detailed, appropriate and adequate, written statement of the reasons explinations for your 12/14/93 descision, including, but not limited to, the following?

1. The nature and contents of, any and all uses of and referenc to, reports, recommendations, disciplinaries, conversations and summaries th you relied on in making your descision, stating the sources that originally ated them.

2. The names of any and all persons who were authors of, partie or references in, any and all reports, recommendations, disciplinaries, conv sations and summaries that you relied on in making your descision.

3.Whether or not any and all of the information that you relied in making your descision was verified by you, or any of your peers and/or su inates to be true, correct, legal and legitimate, and not ordered to be expu by any court.

contained in Utah State Prison Inmate Disciplinary Reports # 2620 and # 2681. If not, please explain in detail how you verified the fact.

5. Whether or not the sources that originally created, any and all of the information that you relied on in making your descision can verify that the information is, presently in their files on a legitimate basis, or in conflict with <u>any</u> court's order of expungment.

6. Whether or not any and all of the information that you relied on in making your descision was based on events occuring prior to 8/24/90. If yes, please state what the events were, and when they occured.

7. Any and all reasons, explinations, information and justifications that are the cause for my service of sentence being nearly twice as long as several other Utah State prisoners who have been convicted of the same offense as I was, and whose case factors are of a much more serious and heinous nature than mine. Please refer to the enclosed Salt Lake Tribune article regarding Kenneth Stanrod, for <u>just one example</u>.

Please inform me by writing me at my enclosed address, as soon as possible, for any costs that I may be required to pay for the written results of your descision that I've requested, so that I may make the necessary arrangements for payment.

Thank You,

Sincerely,

Edward Dale Hardy II
H-11980
P.O. Box 600
Tracy, Calif. 95378-0600

Exhibit 15

State of Utah
BOARD OF PARDONS AND PARLOLE

Michael O. Leavitt
Govenor
Michael R. Sibbitt
Chairman
Donald E. Blanchard
H. L. (Pete) Haun
Curtis L. Garner
Cheryl Hansen
Members

448 East 6400 South - Suite 300
Murray, Utah 84107
Tel (801) 261-6464
Fax (801) 261-6481

February 28, 1994

Edward Hardy, USP# 14736
H-11890
P.O. Box 600
Tracy, CA. 95378-0600

Dear Mr. Hardy:

This letter is in response to your two letters received in January and February 1994. I will attempt to explain the results of your Special Attention Hearing that was conducted on December 14, 1993. The basic issue is that during your Rehearing in September of 1986, the Board had access to two disciplinary reports, the question is that this information was expunged and could the Board in fact use this information to make a decision which ultimately resulted in your September 14, 2004, parole date. IN a consultation with the Attorney General's office, it was concluded that the hearing in 1986 was held before the expungement order and hence, according to the Attorney General's Office does not need to be considered. The Board then made the ultimate decision not to change your September 14, 2004 parole date.

You ask additional questions regarding information in your file and its verification. Generally speaking the Board receives information from the Department of Corrections and through Presentence Investigations, etc. That information is confidential. You can receive the information relative to the GRAMA Act by requesting that information directly from the Board. The Board will not at this time simply give you your Board file.

There has been a recent Supreme Court decision referred to as the Labrum Decision, in which we do disclose file material. Due to the fact that you have no upcoming Rehearing scheduled, you will not receive that file material. The law only applies to people who are coming for Original Hearings or Rehearings after December 1993.

Again, you need to request your file material through the appropriate channels here at the Board of Pardons.

Respectfully,

Paul Larsen
Hearing Officer

Exhibit 17

State of Utah
BOARD OF PARDONS AND PAROLE

Michael O. Leavitt
Governor
Michael R. Sibbett
Chairman
Donald E. Blanchard
H.L. (Pete) Haun
Curtis L. Garner
Cheryl Hansen
Members

448 East 6400 South - Suite 300
Murray, Utah 84107
Tel (801) 261-6464
Fax (801) 261-6481

May 16, 1995

Edward D. Hardy, #11980
P.O. Box 2210
Susanville, CA. 96130

Dear Mr. Hardy:

Your correspondence of April 5, 1995 has been forwarded to me for a response. You ask in that correspondence that your September 24, 1986 re-hearing be vacated, nullified and voided so that your parole date can be corrected and reduced. You site as reason for this request 5 separate issues which you believe should be dealt with by the Board of Pardons. In reviewing your file, I noted that several of the issues have already been addressed by other individuals and therefor will not be addressed in this response.

Issue number 3 however, does not appear to have been addressed earlier. I did review your file and found the four attached documents, all of which give you prior written notice and instructions for your scheduled September 24, 1986 hearing before a full 3 member Board of Pardons.

Given that your new allegation, #3, has proven itself to be without merit and other allegations were addressed in earlier correspondence, I can see no reason for granting your request that your September 24, 1986 re-hearing be "nullified and voided."

Sincerely,

David R. Franchina
Hearing Officer

dcw

State of Utah
BOARD OF PARDONS AND PAROLE

Exhibit 18

Michael O. Leavitt
Governor
Michael R. Sibbett
Chairman
Donald E. Blanchard
H.L. (Pete) Haun
Curtis L. Garner
Cheryl Hansen
Members

448 East 6400 South - Suite 300
Murray, Utah 84107
Tel (801) 261-6464
Fax (801) 261-6481

May 6, 1996

Craig Stephens Cook
Attorney at Law
3645 East 3100 South
Salt Lake City, Utah 84109

Dear Mr. Cook:

The Board has received, from the Attorney General's Office, a copy of your request on behalf of Edward Dale Hardy for reconsideration and a rehearing of Mr. Hardy's case. The Board has thoroughly reviewed the document, in which you provided legal counsel, and finds nothing in it to warrant reconsideration of Mr. Hardy's case or the granting of a shorter parole date.

Even disregarding the disciplinary reports surrounding the 1981 escape, which you ask the Board to ignore, the fact remains that Mr. Hardy was outside the prison without permission for nearly five years, and was convicted of a new felony in California during this time. The fact that the details of his escape are unclear is of little consequence to the Board's decision.

If there was a lack of proper notice of Mr. Hardy's 1986 Board hearing, and if you allege that it impaired his ability to offer information, we invite you, and he, to share such information in writing with the Board now. Presumably, you have done so in your letter. The only apparent "fact" that is new to us, however, is your speculation that Mr. Hardy's criminality was caused by or related to exposure to Agent Orange or the trauma of his Vietnam experience. Considering his history and the seriousness of Mr. Hardy's crimes, this speculation is too insubstantial to merit reconsideration of his current date.

As for your assertion that Mr. Hardy should be given credit for time served on escape from Utah and serving time in California, we know of no authority for this position.

Finally, any additional information you have offered is too insubstantial to merit reconsideration of this case. Based upon this above analysis, your request for a new hearing is hereby denied.

Sincerely,

Michael R. Sibbett
Chairman

MRS/CG/nj